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SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted]
117

HATTIE RAY KING and JAMES ALBERT KING,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
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To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

I. SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners were convicted for violation of Section 5604 (a) (1), Title 26, United States Code (possession of tax-unpaid whiskey) in the United States District Court for the Northern District of Mississippi, Delta Division. Judgment and Commitment was dated March 29, 1963

(R. 149, 150). They appealed to the United States Court of Appeals for the Fifth Circuit contending that they were denied a fair trial for the reason that the trial judge, in effect, directed the jury to return a guilty verdict.

The U. S. Court of Appeals, Fifth Circuit, by opinion dated January 29, 1964 (R. 164) affirmed the conviction. Petitioners sought a re-hearing which was denied by order of the Appeals Court dated March 3, 1964 (R. 173).

On application by Petitioners, the mandate was stayed by Court of Appeals order for a period of thirty (30) days from March 3, 1964.

Petitioners respectfully pray for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit, rendered in this cause on January 29, 1964.

II. STATEMENT AS TO JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked under Section 1254 of Title 28 of the United States Code. The date of the judgment sought to be reviewed by certiorari is January 29, 1964 and the date of this application for certiorari is March 31, 1964.

III. QUESTION PRESENTED.

The question herein presented is whether Petitioners were denied their right to a fair and impartial trial due to conduct of the trial judge in his remarks to the jury

which Petitioners contend amounted to a directed verdict of guilty.

IV. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

Petitioners respectfully contend that the comments of the trial judge to the jury, considered in their entirety, amounted to a directed verdict of guilty for the prosecution. Petitioners assert that said remarks were prejudicial and are grounds for reversal in that they resulted in the conviction of Petitioners thereby affecting their substantial rights and that the U. S. Court of Appeals erred in affirming Petitioners' conviction.

Petitioners concede that the judge's remarks were not properly objected to but Petitioners should not be deprived of their liberty due to the inability of counsel to react properly in such a situation; and, further, that said remarks constitute error sufficiently plain and prejudicial to permit review under Rule 52 (b), Federal Rules of Criminal Procedure.

The trial judge, whether intentionally or not, assumed the role of prosecutor when he told the jury that the testimony of the government witnesses is "quite strong" and that the testimony of the defendants "is awfully weak" (R. 119-20); and the U. S. Court of Appeals for the Fifth Circuit, in upholding said practice, held contrary to the decisions of other courts of appeal involving this same question. *Boatwright v. United States*, 105 F. (2d) 737 (judge must not become an advocate). *Wil-*

liams v. United States, 93 F. (2d) 685 (judge, as here, assumed role of prosecutor). *United States v. Carmel*, 267 F. (2d) 354 (CA 7th, 1959). The rule that, "If a trial court sees fit on the one hand to comment in detail on the evidence introduced by the prosecution, he must, on the other hand, comment in detail with reference to the evidence introduced in behalf of the defense" was violated. *Stoneking v. United States*, 232 F. (2d) 385, cert. den. 352 U.S. 835, 77 S. Ct. 54.

Because of the conflict which exists in the decisions of the Courts of Appeal on this question, and due to the deprivation of Petitioners' right to a fair and impartial trial, the decision of the Court of Appeals for the Fifth Circuit involves an important question of federal trial procedure in criminal cases which has not been, but should be, settled by this Court.

Wherefore, your Petitioners pray, that a Writ of Certiorari issue under seal of this Court, directed to the Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of said Court be reversed and for such further relief as to this Court may seem proper.

Dated this 31st day of March, 1964.

HUGH L. BAILEY,
Attorney for Petitioners.

CERTIFICATE OF SERVICE.

I, Hugh L. Bailey, hereby certify that I have this day mailed, United States Mail, postage prepaid a true and correct copy of the foregoing Petition to Hon. H. M. Ray, United States Attorney, Oxford, Mississippi.

Witness my signature this the .....day of ....., 1964.

HUGH L. BAILEY.